IN THE

Supreme Court of the United States

October Term, 1971

No. 71-834

ALENE McCLANAHAN, on behalf of herself and all others similarly situated, *Appellant*,

vs.

ZONA STATE TAX COMMISSION, *Appellee*.

On Appeal from the Supreme Court of Arizona

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

INTRODUCTION

Pursuant to Rule 16(4) of the Rules of the Supreme t of the United States, appellant herewith files a brief pposition to appellee's motion to dismiss or affirm. ellee takes the position that the questions presented to Court have already been resolved in appellee's favor by ous decision of this Court and therefore no substantial al question has been presented. On the contrary, the ons relief upon by appellee affirmatively show that estion of state taxation of the income of Indians re- and working on an Indian Reservation is still open has not been decided by this Court.

I. PRIOR DECISIONS DO NOT CONTROL THIS CASE

Appellee relies upon *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936), and *Choteau v. Burnet*, 283 U.S. 691 (1931), in support of its assertion that the State of Arizona may tax the income of Reservation Indians in view of Arizona's providing services to the Indians. These three cases arise out of the peculiar and singular Indian-state relationship in Oklahoma and are not applicable to appellant's situation in Arizona. They are fully discussed and distinguished in the Jurisdictional Statement, pp. 14-17. Since the status of Oklahoma Indians is substantially different from that of reservation Indians in Arizona, it is significant that appellee does not support its argument with an analysis demonstrating the applicability of those decisions, despite the disparate and discrete situations of Indians in both states. No such analysis can be made. The Oklahoma cases do not control, and this question is one of first impression for the Court. Cf. *American Federation of Musicians v. Wittstein*, 379 U.S. 171 (1964).

Appellee's reliance upon the two New York cases, *Powless v. State Tax Commission*, 44 App. Div.2d 746, 253 N.Y.S. 2d 438 (1964) and *State Tax Commission v. Barnes*, 14 Misc.2d 311, 178 N.Y.S. 2d 932 (Franklin Co. Ct. 1958) is similarly misplaced, since Congress has expressly conferred jurisdiction over Indian reservations upon the state of New York. *See* 25 U.S.C. §§232-233; *see also*, F. Cohen, Handbook of Federal Indian Law, ch. 22 (1942).

Moreover, no analogy can be drawn between the federal-state dual sovereignty tax cases, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) and *Helvering v. Gerhardt*, 304 U.S. 405 (1938), and the situation in this case

since an Indian reservation does not derive any governmental power from a state. *Toledo v. Pueblo de Jemez*, 119 F. Supp. 429 (D.N.M. 1954); cf. *Williams v. Lee*, 358 U.S. 217, 220-223 (1958).

Nor does *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949) help appellee's position, since it upheld the validity of nondiscriminatory state gross production and excise taxes on petroleum produced by a *non-Indian* lessee from protected Indian land. Moreover, although *Alabama v. King & Boozer*, 314 U.S. 1 (1941) sustained the validity of a state sales tax applied to a contractor doing work for the federal government, the effect of the tax on governmental operations was oblique and indirect, whereas a county personal property tax on mineral rights belonging to the Federal Land Bank was voided because of its direct effect on governmental operation and policy in *Federal Land Bank v. Board of County Commissioners*, 368 U.S. 146 (1961).

Both appellee and the court below contend that the tax does not violate tribal sovereignty because its incidence falls upon the individual rather than on the Navajo Tribe, *McClanahan v. State Tax Comm'n*, 14 Ariz. App. 452, 454-455, 484 P.2d 221, 223-224 (1971); Appellee's Motion to Dismiss or Affirm, pp. 15-16. This is untenable in the light of the fact that the Montana Court's rationale that a grocery debt is a private matter in *State ex rel. Kennerly v. District Court*, 154 Mont. 488, 466 P.2d 85 (1970) was implicitly rejected by this Court when it reversed that decision in *Kennerly v. Montana District Court*, 400 U.S. 423 (1971).

Likewise, both the court below and appellee cite *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), for the proposition that state laws can be extended over Indian lands. But neither the court of appeals nor appellee quotes the following language from that case's opinion:

> These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.

319 U.S. at 75. Arizona's arrogation of the taxing power over reservation Indians necessarily implies a diminution of tribal sovereignty and self-government, a right reserved to the Indians by federal law.

II. SUBSTANTIAL FEDERAL QUESTIONS ARE RAISED BY THIS APPEAL

Appellee has not explained why the questions presented are not "so substantial as to require plenary consideration," Rule 15(1)(f) of the Supreme Court of the United States, since the decisions it relies upon are inappropriate. Even assuming that the decisions cited are applicable, this Court has noted probable jurisdiction to re-examine past decisions "[i]n view of the growing nation-wide importance of the problem." *Camara v. Municipal Court*, 387 U.S. 523, 525 (1967).

In addition, the Navajo Tribe of Indians has moved to intervene as *amicus curiae*. Although one of the principal bases of decision in the lower court is the Arizona income tax's non-interference with tribal self-government, the Navajo Tribe is opposed "to unilateral state assertion of jurisdiction over Indian reservations, without the consent of the Indians affected," as manifested by the decision below. Brief of the Navajo Tribe of Indians as Amicus Curiae, in Support of Jurisdictional Statement, p. 3. Moreover, the Tribe "believes that the application of Arizona's income tax laws to its people and its Reservation will have an untoward economic impact not considered by the Arizona tax-

ing authorities or the Arizona courts." *Id.*, p. 2. *In Kennerly v. Montana District Court*, 400 U.S. 423 (1971), Mr. Justice Stewart stated in dissent that it was against "the most basic principles of fair play" for this Court to decide a question directly affecting tribal-state relations "without first giving the [Blackfeet Tribal] Council an opportunity at least to submit a brief in support of its legislation." 400 U.S. at 432. The Navajo Tribe's intervention as *amicus* gives the Court the benefit of its views on the questions presented by this case, questions which vitally affect the continued progress of the Tribe and its members towards self-determination and self-sufficiency.

Respectfully submitted,

DONALD JUNEAU
THEODORE R. MITCHELL
Counsel for Appellant

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Of Counsel:

BRUCE BRIDEGROOM
STEPHEN A. HARVEY